an action instituted by appellants on their own behalf and on behalf of shippers as a class, to enjoin, annul and set aside orders of the Interstate Commerce Commission (Commission) authorizing nation-wide increases in railroad freight rates in a proceeding entitled Ex Parte No. 259, *Increased Freight Rates, 1968*, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the District Court for the District of Columbia is not yet officially reported. It is attached hereto as Appendix A. The Commission's initial and final reports are reported at 332 I.C.C. 590 and 332 I.C.C. 714 and copies are attached hereto as Appendix B and Appendix C, respectively.

JURISDICTION

This suit was brought pursuant to 28 U.S.C. § 1336 to set aside an order of the Commission of November 25, 1968 and, by amended and supplemental complaint, a subsequent order of January 9, 1969. The judgment of the District Court dismissing the complaint was entered December 18, 1969 and notice of appeal was filed in that Court February 4, 1970. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *City of Chicago v. United States*, 38 *Law Week* 4039, December 9, 1969; *American Trucking Association, Inc. v. Atchison T. & S. F. Ry.*, 387 U.S. 397; *United States v. Drum*, 368 U.S. 370.

STATUTES INVOLVED

Section 551, 702 and 704 of Title 5, United States Code, section 1336 of Title 28 and sections 13(1), 15(1), 15(7) and 15a(2) of Title 49 are set forth in Appendix D hereto.

QUESTION PRESENTED

May shippers, both individually and as a class, be denied judicial review of Commission orders, entered after hearing and investigation, insofar as they authorize across-the-board increases in the level of railroad freight rates and charges, and modify outstanding rate orders and grant Fourth Section relief to the extent necessary to permit the increases to become effective?

STATEMENT OF THE CASE

THE PROCEEDINGS BELOW

In Ex Parte No. 259, *Increased Freight Rates, 1968*, the nation's railroads sought authority to increase substantially all freight rates and charges by varying percentages averaging about 5 percent. It was instituted by the filing with the Commission of a petition seeking (1) permission to depart from some of the Commission's tariff filing regulations, (2) authority to make the increases effective "upon a finding that the general level of rates as increased will be just and reasonable" and (3) such other relief (including modification of outstanding orders and Fourth Section Relief) as might be necessary to permit the increases to become effective. On the following day, the Commission entered an order permitting the requested departures from its tariff filing regulations and authorizing the filing of such tariffs but subject to possible suspension.

After a preliminary hearing the Commission suspended the increases to the extent that they exceeded three per-

cent and instituted an investigation concerning their lawfulness. Thereafter the Commission entered a further order dividing the proceeding into ten parts, Sub No. 2, Railroad Cost and Revenue Needs and Sub Nos. 3-11 to each of which were assigned issues respecting specific commodities or services. The issue in Sub No. 2 was how much, if any, additional revenue was needed and should be provided by an increase in rates. The issue in the other subproceedings was how much of any increase authorized in Sub No. 2 should be borne by individual commodities or services.

On November 26, 1968, the Commission served its report and order of November 25 which was dispositive of the issues in Sub No. 2. It authorized the increases to be made effective on one day's notice and modified outstanding rate orders and granted Fourth Section Relief to the extent necessary to permit the increases to become effective. The order was "based upon the entire record, including the evidence and briefs of the parties" and contained a finding that "The increased freight rates and charges herein authorized will not exceed a maximum just and reasonable level of rates and charges". (App. B, pp. 596, 609).

The present action was instituted on the following day. Appellants moved for a temporary restraining order which was denied on November 27 and the increases became effective at 12:01 A.M. November 28.

On January 9, 1969, the Commission issued a further report and order devoted primarily to the reasonableness of the allocation of the authorized increases among the various commodities and services. That report adopted the findings of the November 25, 1968 report and order with respect to the railroads' revenue needs "as though fully restated" therein and discontinued the investigation. (App. C, p. 714)

Appellants subsequently filed an amended and supplemental complaint which sought review of the January 9, 1969 order also and converted the action into a class ac-

tion in behalf of all shippers similarly situated. Appellants are either shippers or trade associations representing shippers who bear over 20 percent of the total increases approved by the Commission in Ex Parte No. 259.

Appellants challenged the lawfulness of the Commission's orders on the following grounds:

(1) The Commission did not apply the statutory standards (49 U.S.C. §15a(2), App. D p. 7) and its ultimate findings are supported neither by the requisite basic evidentiary findings nor by substantial evidence.[1]

(2) Despite wide differences in financial needs of the railroads in the eastern, western and southern districts, the Commission, without explaining or justifying such action, authorized the same measure of increase nationwide.

(3) The Commission refused to consider the unit costs of performing the various railroad transportation services.

POSITION OF DEFENDANTS BELOW

The Department of Justice filed a neutral answer. The Commission defended its order on the merits. It "expressly waive[d] the defense, suggested by *Algoma Coal & Coke Co. v. United States*, 11 F. Supp. 487, 495-6 (E.D.

[1] The Commission authorized the increase on the basis of a finding that between 1966 and 1968 the railroads had incurred increased operating costs which exceeded the sum of the rate increases granted in the immediately preceding general increase case (Ex Parte No. 256, *Increased Freight Rates, 1967*), and those sought in Ex Parte No. 259. It justified the use of 1966 as a base year solely on the ground that "it reflects recent experience not complicated by a major rate revision, and the traffic volume is close to the current level." (App. B, p. 599) It made no findings as to (1) the reasonableness of the 1966 level of rates, (2) the financial needs of the railroads in the period beyond 1968, (3) the capital investment required, even for 1968, to enable the railroads to provide adequate and efficient transportation service, (4) the revenues required to finance such capital investment, or (5) the amounts needed to pay dividends.

Va. 1935), that [28 U.S.C. §§1336, 2284 and 2321-2325] do not confer jurisdiction over the permissive orders entered by the Commission." (Brief, p. 7, Answer, p. 1) Only the railroads questioned the jurisdiction of the Court.

OPINION OF THE COURT BELOW

The Court by a two to one vote (Wright J. dissenting) adopted the railroads' position. It held that it lacked jurisdiction and dismissed the action on the ground that *Algoma* was controlling. The Court stated that the increased rates are "permissive and not mandatory" and that parties may challenge "any particular rates which affect them" by filing a Section 13 proceeding with the Commission. It is not clear whether the Court was holding that the orders are not reviewable because they are "permissive" or because they are not ripe for review.

THE QUESTION IS SUBSTANTIAL

An increase in the general level of railroad freight rates affects every business and consumer directly or indirectly. Whether an order affirming such an increase is subject to judicial review is the important public interest type of question which led the Congress, many years ago, to provide for direct appeal to the Supreme Court in Commission cases.

1. Authorization to review the Commission's orders in Ex Parte No. 259 is conferred both by section 1336 of Title 28 of the United States Code which gives the District Courts jurisdiction of actions to set aside orders of the Commission and by the Administrative Procedure Act. The Commission's orders approved rates for the future. Section 551 of Title 5 defines rule as including "the approval or prescription for the future of rates" and defines agency action as including an agency rule. Agency action is made subject to court review by sections 702 and 704 of Title 5.

The modern view is that "the Administrative Procedure Act's 'generous review provisions' must be given a 'hospi-

table' interpretation" and that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress". *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-141. This basic philosophy was reaffirmed in *City of Chicago*:

> . . . we start with the presumption that aggrieved persons may obtain review of administrative decisions unless there is "persuasive reason to believe" that Congress had no such purpose. (38 L.W. 4039)

The Court below points to nothing which even remotely suggests a Congressional purpose to deny judicial review of the Commission's orders here involved.

2. The general increase case is the procedure by which the railroads obtain authority from the Commission to increase their rates and charges across the board. It is particularly important, therefore, that Commission orders in such proceedings be subject to judicial review. Railroad freight charges are a significant part of the cost of operating a business. The railroad freight bill of the nation in 1969 was over $10 billion. The public therefore has a vital interest in the Commission applying the standards of justness and reasonableness prescribed by Section 15a(2) of the Interstate Commerce Act and particularly the requirement that freight rates be at a level which will provide "adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service." It would be ironic if shippers who clearly have the right to obtain court review of an order authorizing an increase in a particular rate should be denied review of an order authorizing an increase in *all* rates. Whether such an order is subject to court review has never been passed upon by this Court. This important issue should be settled.

3. That an administrative determination is permissive rather than mandatory is not a reason for denying court review. Where the Commission, after investigation, permits a rate to go into effect, the courts have always held that

an aggrieved party is entitled to review. (See e.g. *I.C.C. v. Inland Waterways Corporation*, 319 U.S. 671; *Western Paper Makers Chemical Company v. United States*, 271 U.S. 268.[2]) The recent decision in *City of Chicago*, decided subsequent to the opinion of the Court below, disposes once and for all of any contention that permissive orders are not reviewable.

Here, as in *City of Chicago*, the carriers could obtain judicial review if their petition had been denied and there is "no talismanic sign indicating that Congress desired to deny review to opponents of [the increases] alone." [38 L.W. 4039]

4. The Commission's orders did more than approve increases in rates. They also modified outstanding rate orders and granted widespread Fourth Section relief. A shipper who has obtained a maximum rate order after litigation is clearly entitled to court review of a subsequent Commission order modifying that particular order. *Chicago B&O R.R. Co. v. United States*, 242 F. Supp. 414 (N.D. Ill.) *aff'd* 382 U.S. 422. An order which modifies *all* outstanding rate orders would seem to be no less reviewable. Fourth Section orders are likewise reviewable. *A.L. Mechling Barge Lines, Inc. v. United States*, 376 U.S. 375.

5. Even assuming, arguendo, that *Algoma Coal & Coke Co. v. United States*, 11 F. Supp. 487 (E.D. Va.) was correctly decided, the reliance on it by the District Court was misplaced:

(a). *Algoma*, which was decided prior to both *Rochester Telephone Corp. v. United States*, 307 U.S. 125 and the Administrative Procedure Act, places major reliance on the "permissive order" doctrine (11 F. Supp. 487, 493-4);

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[2]Other cases in which this Court has permitted review of an administrative agency's "permissive" orders include: *Skelly Oil Co. v. Phillips Petroleum*, 174 F. 2d. 89 (1949), *aff'd.* 339 U.S. 667 (1950); *C.A.B. v. State Airlines, Inc.*, 338 U.S. 572 (1950); *Yale T. Corp. v. United States*, 210 F. Supp. 862 (1962), *aff'd.* 373 U.S. 540 (1963).

(b) in *Algoma* the Court regarded the case before it as involving only a failure by the Commission to suspend (11 F. Supp. 487, 495);

(c) in *Algoma*, unlike the present case, plaintiff sought review only of the rates on a particular commodity. The railroads' need for additional revenue (and therefore for a general increase) was "conceded by all, or at least, not disputed" (11 F. Supp. 487, 494);

(d) in *Algoma*, the Court was concerned with the possibility, not here present, that lack of uniformity might result from the seeking of relief on particular rates or commodities by different shippers in different jurisdictions (11 F. Supp. 487, 496).

6. The orders below meet all tests of ripeness. The rationale of the ripeness doctrine as stated in *Abbott Laboratories v. Gardner, supra*, is:

> . . . to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. 387 U.S. 136, 148.

Applying this test to the present litigation, there can be no question but that the effects of the decision are being felt in a concrete way by appellants and by all members of the class in whose behalf this action was brought. As a result of the Commission's action, shippers are making additional payments of over $450 million a year, of which appellants' share is in the neighborhood of $100 million.

Nor can there be any serious question of the Courts "entangling themselves in abstract disagreements over adminis-

trative policies" since we have a final decision authorizing the increased rates to go into effect. The orders of the Commission here involved are unlike the regulations considered in *Toilet Goods Association* v. *Gardner*, 387 U.S. 158, for example, which provided that the agency "*may*" take action under certain circumstances with no certainty that it would in fact do so. They are rather like the regulations in *Columbia Broadcasting System v. United States*, 316 U.S. 407; *United States v. Storer Broadcasting Co.*, 351 U.S. 192; and *Frozen Food Express v. United States*, 351 U.S. 40 which, though not affecting the parties involved as directly as the orders of the Commission in this case, were held to be sufficiently "ripe" to be subject to judicial review.

7. If denied judicial review of the orders here involved, appellants are left with no recourse. The course suggested by the Court below—that appellants "challenge any particular rates which affect them under the procedures provided in Section 13 of the I.C.C. Act" is not a remedy at all. As Judge Wright notes (App. A., p. 5) appellants "are not seeking to challenge the appropriateness of any rate or combination of rates." They are challenging the lawfulness of the increases as applied to all rates and the underlying findings of railroad revenue need. These issues are not the issues which would be involved in a proceeding involving the reasonableness of rates on particular segments of traffic.

The reasonableness of a rate necessarily involves two questions:

(1) What overall level of rates is obtained by applying the statutory standards of justness and reasonableness?

(2) Is the particular rate properly related to such overall level?

In a complaint on a particular rate, only the latter issue could be litigated. If all rates should be raised 100 percent, for example, and a particular rate had been on a reasonable

basis prior to the general increase, the Commission would necessarily hold in a complaint case that the new rate was also reasonable because it would have the same relationship to other rates and to the general level of rates.

The usual procedure in a complaint case is for the Commission to look at rates prescribed in the past and compare the new rate with such rates plus all general increases since their prescription. Thus, in *Alabama State Docks Dept. v. Alabama, T. & N.R.* Co., 321 I.C.C. 347, in finding that the assailed rates were not unjust and unreasonable, the Commission held:

> However, the assailed rate is below the maximum level prescribed on domestic clean rice in *Arkansas Rice Traffic Bureau v. Aberdeen & R.R. Co.*, 219 I.C.C. 5, 25, *as adjusted for general increases* [p. 353]. (emphasis added)

To relitigate the lawfulness of a general increase in a subsequent proceeding involving a particular rate would be wholly impracticable since this would require the equivalent of a general increase proceeding in each case. (*Cf. Federal Power Commission v. Texaco, Inc.*, 377 U.S. 33, 44) Even if shippers could undertake such a burden, the Commission would not permit it. In *Koppers Co. Inc. v. C&O Ry. Co.*, 303 I.C.C. 383 (1958) the Commission refused to consider whether a general increase authorized in Ex Parte No. 175 was justified stating:

> Admittedly, the variances in the assailed proportional rates stemmed from our general authorization in that proceeding, but whether or not the permissive order entered was justified based on the evidence of record therein is not a relevant consideration in the instant proceeding. [p. 387].

As Judge Wright so cogently puts it in his dissent below

> Considering challenges to the general order now would avoid needless relitigation of the same issue before the Commission in countless rate-making

> proceedings involving individual commodities. Furthermore, I think that it would be difficult if not impossible for any shipper to challenge this determination of a nationwide railroad need for revenue in the context of an individual rate-making proceeding. This is the sort of threshold issue which ought to be determined once and for all at the outset, preferably, as plaintiffs here seek to do, in a class action. (App. A, p. 5-6)

Atlantic City v. State of New York, Civil Action No. 69-800, Southern District of New York, October 28, 1969[3] seems to suggest that the proper procedure is to file a Section 13 proceeding and then seek Court review of the Commission's decision in the general increase proceeding along with review of its decision on the specific rate. Why a shipper should ever be forced to follow such a time-consuming, expensive and circuitous route is not explained. But in any event, this procedure would not be available to appellants since we are not contesting the relationship of any rate to the general level of rates. We are complaining about the general increase in all rates. Accordingly, we would have nothing to present to the Commission in a Section 13 proceeding by way of a challenge of "any particular rates" and nothing would be gained by delaying review of the Commission's order in Ex Parte No. 259 pending completion of such a proceeding.

It is submitted that the questions presented by this appeal are substantial and of great public importance. The decision of the District Court is inconsistent with established principles governing reviewability of administrative

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[3] *Atlantic City* involved reviewability of the Commission's orders in Ex Parte No. 259. It has been appealed to the Supreme Court and is docketed as No. 1083.

orders as enunciated in *Abbott Laboratories* and *City of Chicago* and the Court may deem the case appropriate for summary reversal.

Respectfully submitted.

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Attorneys for Appellants

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ALABAMA POWER COMPANY, et al.,	:	
Plaintiffs	:	
v.	:	Civil Action
UNITED STATES OF AMERICA, et al.,	:	No. 2970-68
Defendants.	:	

Messrs. Charles J. McCarthy, J. Raymond Clark and William M. Maddox argued for the plaintiffs.

Mr. William A. Imhof argued for the Secretary of Agriculture as intervening plaintiff.

Mr. Arthur J. Cerra argued for the defendant, Interstate Commerce Commission.

Mr. Richard J. Murphy argued for the railroads as intervening defendants.

Before WRIGHT, Circuit Judge; TAMM, Circuit Judge; and CORCORAN, District Judge.

OPINION

Corcoran, District Judge: This action was instituted by several groups of shippers to enjoin, annul and set aside certain rate increase orders of the Interstate Commerce Commission entered November 26, 1968 and January 9, 1969 in *Ex Parte No. 259, Increased Freight Rates, 1968*.[1] These orders permitted Class I railroads of the United States to effect a general increase in their freight rates and charges to offset the increase in expenses which had occurred in the 1967-1968 period.

The Secretary of Agriculture intervened as a party plaintiff and several Class I railroads intervened as party defendants.

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[1] 332 I.C.C. 714.

In substance the plaintiff shippers contend that the ultimate findings of the Commission as to the need for increased railroad revenue were not based upon adequate subsidiary findings and were not supported by substantial evidence on the record since the Commission failed to determine,

> "how much revenue the railroads would need: (1) for operating expenses, rents and taxes; (2) for capital improvements including (a) the revenues needed to pay for improvements to be financed by internally generated funds, and (b) the additional revenues needed to enable them to obtain the funds required for externally financed improvements; and (3) the amounts needed for debt service and dividends. It should also have looked at and determined the railroads' future needs and not simply their present requirements."[2]

The plaintiffs further contend that the Commission ignored the differences in the financial needs of the railroads in the three railroad districts and failed to require the railroads to present evidence of the unit cost of performing transportation services.

The intervening Secretary of Agriculture argued that the Commission did not hold the railroads to the recently announced new standard of proof which it had expressed in *Ex Parte No. 256, Increased Freight Rates, 1967*,[3] and further that the Commission did not consider the effect of the rate increases upon the movement of traffic.

The defendant railroads submitted that the orders of the Commission, being permissive general increase orders, were non-reviewable, relying on *Algoma Coal and Coke Co. v. United States*.[4] They further submitted that even if the

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[2] Plfs. Brief p. 18.

[3] 332 I.C.C. 285.

[4] 11 F. Supp. 487 (E.D. Va. 1935) (hereinafter referred to as *Algoma)* and related cases, *infra.*

orders were held to be reviewable, the I.C.C. had observed the required statutory standards and the orders of the Commission had contained adequate findings supported by substantial evidence.

The I.C.C. did not join in the jurisdictional objection proffered by the railroads but chose to defend its action on the merits, contending that it had made the requisite findings which were supported by substantial evidence.

The Court concludes that it lacks jurisdiction to review the questioned Commission orders, and that it is unnecessary, therefore, to reach the issues raised by the plaintiff shippers and the intervening Secretary of Agriculture.

It is to be noted that the rates which have become effective under the I.C.C. orders are permissive and not mandatory, and that the Commission in its Ultimate Conclusions and Findings in *Ex Parte 259* declared in No. 15:

> "Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act." 332 I.C.C. 792.

The foregoing declaration assures any aggrieved party, such as the plaintiffs herein, the opportunity to challenge any particular rates which affect them under the procedures provided in Section 13 of the I.C.C. Act, 49 U.S.C.A. §13.

Under such circumstances it is the Court's opinion that this case should be governed by *Algoma*.[5] In that case District Judge Chesnut, writing for a three-judge court,[6] noted:

> "The position taken by the plaintiffs seems to misconceive the real nature and effect of the Commission proceeding. They take the view that what the Commission did in effect was to determine what would be just and reasonable rates for particular traffic transported by particular railroads, on insufficient findings of fact.
>
> * * * * * *
>
> "[T]his misconceives what the Commission did. It *prescribed* no particular rates. It merely permitted the carriers to file new rates without suspension. It will, therefore, be open to the plaintiffs to present their contentions as to the particular rates affecting them in proper proceedings before the Commission under section 13 (48 USCA § 13). That is to say, the increased rates now complained of are *carrier made* rates and not *Commission* made rates."

The factual and legal questions considered in *Algoma* are identical with those raised in the present proceeding; and, in the opinion of the Court, *Algoma* represents the applicable law.[7]

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[5] *Supra* Note 4, 11 F. Supp. at 493-494.

[6] Circuit Judge Soper and District Judge Way sat with Judge Chesnut.

[7] *Algoma's* position that the court will not entertain a suit to enjoin the Commission's orders in a general revenue proceeding where section 13's remedy has not yet been exhausted has been followed in *Koppers Co. v. United States*, 132 F. Supp. 159 (W.D. Pa. 1955); *Florida Citrus Commission v. United States*, 144 F. Supp. 517 (N.D. Fla. 1956), *aff'd*, 352 U.S. 1021 (1957); *Atlantic City Electric Co. v. United States*, S.D. N.Y., ___ F. Supp. ___ (No. 69 Civ. 800, October 28, 1969).

Accordingly, the complaint is dismissed.

/s/ Edward A. Tamm
Edward A. Tamm, Circuit Judge

/s/ Howard F. Corcoran
Howard F. Corcoran, District Judge

Wright, Circuit Judge, dissenting: It is improper, in my judgment, to dismiss this suit at this time. Instead, I think we ought to examine the order now and decide whether the Commission's action was supported by substantial evidence. I am in complete agreement with the proposition that any plaintiff who wants to challenge any rate now being charged must first pursue his administrative remedies under Sections 13 and 15 of the Act. However, the plaintiffs here are not seeking to challenge the appropriateness of any rate or combination of rates. Instead, they wish to challenge the propriety of a Commission order which allowed the rates generally to be raised by the carriers. That order was predicated on a factual determination by the Commission that the nation's railroads need more freight revenue. That order, like any action of the Commission, must be based on substantial evidence. *Cf. United States v. Louisiana*, 290 U.S. 70, 77 (1933). Such an order is, of course, judicially reviewable. 28 U.S.C. §§ 1336, 2325 (1964), and I feel it is ripe for review now.

There can be no doubt that there are plaintiffs who are aggrieved now by this order. The effect of the order was to remove the upper limits on rates which the Commission had prescribed for certain commodities. Without this order, the railroads could not have increased any of the Commission-made rates. Shippers, therefore, are paying higher rates now as a direct result of this Commission determination. *See Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

Considering challenges to the general order now would avoid needless relitigation of the same issue before the Commission in countless rate-making proceedings involving

individual commodities. Furthermore, I think that it would be difficult if not impossible for any shipper to challenge this determination of a nationwide railroad need for revenue in the context of an individual rate-making proceeding. This is the sort of threshold issue which ought to be determined once and for all at the outset; preferably, as plaintiffs here seek to do, in a class action.

I admit that there is little direct language in the existing cases supporting judicial review of the order now. Review now does seem eminently sensible to me, however, in spite of the fact that *Atlantic City*[1] seems to preclude it. Furthermore, both the *Algoma*[2] and the *Florida Citrus*[3] cases can be read as sanctioning this limited, threshold review. After holding that the plaintiffs could not challenge individual carrier-set rates until they were passed upon by the Commission, both courts did consider the propriety of the general order entered by the Commission. Both concluded that the general order was supported by substantial evi-

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[1] *Atlantic City Electric Co. v. United States*, S.D. N.Y., ___ F. Supp. ___ (No. 69 Civ. 800, October 28, 1969).

[2] *Algoma Coal & Coke Co. v. United States*, E.D. Va., 11 F. Supp. 487, 494-495 (1935).

[3] *Florida Citrus Comm'n v. United States*, N.D. Fla., 144 F. Supp. 517, 524-527 (1956), *affirmed*, 352 U.S. 1021 (1957).

dence. Consequently, neither of these cases, in my judgment, supports the disposition made here or in *Atlantic City*.[4]

I respectfully dissent.

/s/J. Skelly Wright
J. Skelly Wright, Circuit Judge

Dated Dec. 3, 1969

[4] It is not inconsistent to hold that individual rates must be first challenged before the Commission, but at the same time to permit judicial review of the propriety of the general order. Two different determinations are made by the Commission. In the first proceeding, which leads to the general order permitting the carriers to raise rates, the Commission determines that the railroads need more revenue. That order will stand if the court finds that it is based on substantial evidence. *Florida Citrus Comm'n v. United States*, *supra* Note 3, 144 F. Supp. at 524-527; *Algoma Coal & Coke Co. v. United States*, *supra* Note 2, 11 F. Supp. at 494-495. In the second proceeding, the Commission has to determine the reasonableness of individual rates. That determination, too, is subject to judicial scrutiny. 28 U.S.C. § 1336 (1964); *see Swift & Co. v. United States*, 343 U.S. 373 (1952).

APP B

30432

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 259

INCREASED FREIGHT RATES, 1968

EX PARTE NO. 259

INCREASED FREIGHT RATES, 1968

Decided November 25, 1968

1. After hearing and consideration of briefs, found that the Nation's railroads are in immediate need of increased freight revenue to offset rising operating costs.
2. As interim relief, order entered June 19, 1968, suspending tariff schedules, vacated in part.
3. Investigation of all proposed increases in rates and charges continued.
4. Appropriate order entered, including modification of our outstanding orders and fourth-section relief.

Andrew C. Armstrong, Curtis H. Berg, John J. Burchell, Charles W. Burkett, Martin L. Cassell, Charles W. Chapman, J. T. Clark, Charles H. Clay, Monroe E. Clinton, John A. Daily, J. R. Davis, J. H. Doeringer, Paul R. Duke, Stuart F. Gassner, Edward R. Gustafson, John W. Hanifin, Louis A. Harris, W. P. Higgins, James L. Howe III, E. E. Hunt, Harvey Huston, Edward A. Kaier, W. A. Kimbrough, Jr., W. Bruce Kopper, A. W. Laisy, R. J. Lally, Ralph L. Lanigan, Harry B. LaTourette, Don McDevitt, John D. Morrison, Robert C. Morton, Richard J. Murphy, J. J. Nagle, Milton E. Nelson, Jr., W. J. O'Brien, Prime F. Osborn, C. Harold Peterson, C. A. Prior, John F. Reilly, Charles C. Rettberg, Jr., Albert B. Russ, Jr., R. J. Schreiber, Preston C. Shannon, R. D. Sickler, John F. Smith, J. M. Souby, Jr., R. H. Stahlheber, Richard H. Strodel, James A. Tapley, D. M. Tolmie, L. E. Torinus, Jr., W. G. Treanor, M. R. Warnock, J. C. Waterman, John E. Weiss, and *Robert J. Williams* for respondents.

Charles H. Gilbert, E. F. Heitz, William A. Imhof, James H. Lauth, Charles M. Pearson, Leon Schill, and *Ronald P. Vail* for the Secretary of Agriculture.

Ralph L. Trisko and *Pedro R. Vazquez* for the Department of Commerce.

Dellon Coker for the Department of Defense.

Murray Chais for the Atomic Energy Commission.

Leonard M. Shinn for General Services Administration, Department of Defense, and other government agencies.

Robert F. Lenzi for General Services Administration.

James M. Henderson for the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, Rhode Island, Massachusetts, New Jersey, Delaware, Maryland, Pennsylvania, and Virginia and other Virginia interests.

Robert A. Lane for the State of California and the California Public Utilities Commission.

Hector Anninos, Robert A. Lane, and *Mary Moran Pajalich* for the California Public Utilities Commission.

John I. Finsness for the Kansas State Corporation Commission, South Dakota Public Utilities Commission, North Dakota Public Service Commission, Montana Board of Railroad Commissioners, Minnesota Department of Public Service, Nebraska State Railway Commission, and the Wyoming Public Service Commission.

Maynard C. Dolloff and *Frank D. Reed* for the Maine Department of Agriculture.

John L. Crothers, Jr. for the Maryland State Board of Agriculture.

Jerome E. Pederson for the Minnesota Public Service Commission.

C. Lowell Purdy for the Montana Commissioner of Agriculture.

Gordon E. Ganka for the Nebraska State Railway Commission.

Robert L. Christensen for the New Hampshire Department of Agriculture.

Phillip Alampi for the New Jersey Department of Agriculture.

Louis J. Lefkowitz, Walter J. Maskowski, and *Dunton F. Tynan* for the State of New York.

D. M. Dalrymple for the New York State Department of Agriculture and Markets.

John M. Agrey for the North Dakota Public Service Commission.

Charles O. Ham, Jr. for the State of Oklahoma Corporation Commission.

Thomas W. Dench, Sam R. Haley, and *James E. Singleton* for the Public Utility Commissioner of Oregon.

Leland H. Bull for the Pennsylvania Department of Agriculture.

Eugene P. Springer for the South Dakota Public Utilities Commission.

Maurice B. Rowe for the Virginia Department of Agriculture and Commerce.

Arthur W. Jacocks for the Virginia State Ports Authority.

William R. Brumfield and *Harold C. Heublein* for the Wisconsin Public Service Commission.

Karl E. Bakke, Michael Bradfield, Walter Hollis, George D. Krumbhaar, Jr., W. Patrick Morris, John B. Rehm, Fred B. Smith, Pedro

R. Vazquez, Edward Weinberg, John Geoffrey Will, and *Bruce Wright* for the Federal Interagency Committee on Coal Exports.

William B. Adams, Stanley W. Akers, V. Alexander, W. P. Allen, Jr., Eugene D. Anderson, Gordon R. Anderson, William C. Andrews, John J. Archer, Arthur A. Arsham, Robert C. Bachelder, William L. Bailes, Jr., Robert L. Banks, Howard J. Benson, Klaus Bergman, James E. Bilbo, Jacob P. Billig, Douglas W. Binns, Richard B. Blackwell, Calvin L. Blaine, Chas. E. Blaine, Robert A. Blocki, R. F. Bohman, Sr., George H. Borts, Harold A. Bowron, Jr., J. Robert Bray, Edward K. Brenner, Jerry H. Brenner, Charles A. Brock, Charles T. Brookman, Frank C. Brooks, Carman E. Brown, Charles L. Bucy, Robert S. Burk, John H. Caldwell, Donald J. Carlson, William L. Carter, Bernard B. Caruso, Richard A. Chrz, J. Raymond Clark, John M. Cleary, M. J. Cloughesy, Garth Coffin, Albert Cohen, Clyde Comstock, C. D. Coppinger, D. H. Core, Jr., Leon Coslov, Richard E. Costello, Leslie M. Cox, Richard Crabtree, Fred S. Crittenden, D. P. Cromwell, Norman L. Cummins, F. P. Daleiden, Wilma M. Dalton, A. P. Davis, Jr., M. J. Davis, J. Douglas Dawson, William D. Day, Samuel F. Delisi, Edward J. Dempsey, Ray B. Dewey, James A. Diehl, Norman E. Dietrich, C. R. Dollinger, Sr., John Dollinger, Jr., John F. Donelan, Fred C. Doutel, James L. Downs, George B. Dutton, Jr., Samuel W. Earnshaw, Milton K. Eckert, Harry Eggert, Scott H. Elder, Vernon L. Everngam, Ernest Falk, Glen L. Fast, Gerald W. Fauth, Jr., W. E. Fincher, A. William Finke, R. C. Flesch, Robert H. Foltz, Charles F. Forgue, Max G. Fortune, Max E. Foster, Edward B. Frankel, Samuel R. Freeman, Alfred E. Froh, Richard W. Gaudern, F. E. George, John W. Gilius, Kenneth L. Gillis, Irving R. Glass, Richard Gordon, Robert H. Gorske, Howard Gould, J. L. Guthrie, George F. Hall, G. Robert Hallett, Jr., Roy Hancock, T. Vernon Hansen, Richard J. Hardy, Robert E. Harridge, Richard Harrington, Louis B. Hartlage, Leo P. Hearn, George A. Heitz, R. J. Helm, James M. Henderson, Joseph W. Hepburn, Raymond M. Hilbert, Walter Hoffman, Brian Holtz, John L. Hopkins III, O. Denton Hudson, Bernard Hulkower, John Hummel, Joseph A. Illes, James J. Irlandi, James M. Jones, Jr., N. J. Jordan, S. Harrison Kahn, R. E. Kanauss, William Q. Keenan, Leo J. Kelleher, Jr., Charles A. Kelly, Daniel J. Kennedy, John A. Kennedy, Jr., John J. Kerr, Robert Kharasch, L. O. Kimberly, Jr., Fred M. Kimbrough, Wade Kimsey, Edward S. Kirby, T. B. Kircher, Alan M. Kirk, Robert M. Koch, Dwight L. Koerber, David A. Kosh, James S. Laird, John F. Lane, Carl J. Lessing, Robert Levin, Arnold Levy, William M. Lewis, Jr., Robert C. Liebenow,

Eugene T. Liipfert, William J. Lippman, Dickson R. Loos, Frank Loughran, Gordon P. MacDougall, William M. Maddox, Nate Magid, L. D. Mangan, Edwin E. Marsh, Sheila H. Marshall, Lauman Martin, Phillip A. Martin, C. L. Mayfield, Charles J. McCarthy, Don McDevitt, Graham W. McGowan, Thomas F. McGrath, C. McIntosh, Kathleen C. McManus, R. W. Meckfessel, Charles M. Meehan, Henry P. Megargee, Jr., Joseph M. Michaels, G. G. Miller, John L. Miller, Reeder C. Miller, S. H. Moerman, Marvin H. Morse, James F. Mulligan, John C. Mundt, George H. Nafziger, Alfred J. Navaroli, Robert M. Neary, Wesley C. Newman, J. H. Norton, Allen J. O'Brien, Lawrence J. O'Connor, C. V. O'Hern, Jr., James J. O'Malley, Jr., Samuel Omasta, Richard G. Olson, D. J. Osbjornson, L. A. Parish, John T. Parkinson, Gilbert J. Parr, J. D. Patterson, Leroy E. Peabody, Jr., Richard H. Pennell, Robert R. Pester, John S. Peters, John W. Peterson, Leonard E. Peterson, M. G. Peterson, E. H. Pierson, Harold M. Pockrose, Frank E. Polom, K. M. Potter, Roy B. Powell, M. T. Power, Harry D. Pugsley, Francis P. Pusateri, T. A. Quintrell, Clarence R. Reed, Lawrence A. Reedquist, Joseph V. Regan, David Reichert, Arthur M. Ribe, Charles H. Rice, Jack E. Richert, E. V. Robinson, Jr., Alfred A. Rochester, O. H. Roehling, Allan A. Rubin, James A. Ruffalo, Henri F. Rush, Jr., Charles Rust, William A. Ryan, John R. Scanlan, L. Schaffel, Robert M. Scott, Durward Seats, Herbert W. Sears, S. L. Seftenberg, Ashley Sellers, John L. Shissler, Jr., F. L. Siglah, Jerome H. Simonds, Clarence E. Sims, Charles W. Singer, William L. Slover, Charles F. Smith, Darrell H. Smith, Jr., E. R. Smith, Milton H. Smith, William K. Smith, William U. Smith, Wilson W. Snyder, William P. Spencer, John C. Spythalski, Charles W. Stadell, John R. Steuteville, Oliver L. Stewart, Tyrus C. Stewart, Nelson A. Stitt, T. M. Storer, William S. Story, Martin F. Strate, Elmer F. Streib, Charles O. Strickler, W. J. Sullivan, Daniel J. Sweeney, J. L. Tompkins, William H. Towle, Matthew L. Triggs, Thomas H. Truitt, Benjamin Trumbull, Jack R. Turney, Jr., Harry P. Vaughan, Clinton H. Vescelius, C. H. Wager, H. F. Wagner, Van B. Wake, J. F. Wallace, John A. Ward, Richard G. Warren, C. C. Warwick, Paul P. Watkins, M. R. Watson, Everett A. Weathers, E. Jerome Webster, Jr., Ben Weiner, George B. Weir, M. W. Wells, M. W. Wells, Jr., Robert R. Wertz, J. S. White, Jr., Henry M. Wick, Jr., Harley W. Williams, Arthur L. Winn, Jr., Louis H. Winnard, George Thomas Wright, Joseph W. H. Wright, and *Charles H. Wulff* for protestants.

INTERIM REPORT OF THE COMMISSION

BY THE COMMISSION:

This proceeding concerns comprehensive increases in freight rates and charges proposed by the railroads to offset rising operating costs. The last permanent general increase was permitted in Ex Parte No. 256, *Increased Freight Rates, 1967*, 329 I.C.C. 854; 332 I.C.C. 280. On March 7, 1968, approximately 1 month after the final report in that proceeding was issued, substantially all of the class I railroads of the United States and some railroads of other classifications, for themselves and on behalf of certain water and motor carriers, filed a petition for authority to depart from the rules governing tariff publication to permit the proposed increases to be published and filed in a short form, which was granted. The petitioners also sought modification of outstanding rate orders, authority to depart from section 4 of the Interstate Commerce Act, and all other relief that might be necessary to permit the proposed increases to become effective without suspension.

Increased rate proposal.—On March 11, 1968, the railroads filed their master increase tariff, X-259, containing the schedules of proposed increases in freight rates and charges.[1] Originally published to become effective on May 27, 1968, this date was subsequently voluntarily postponed to June 24, 1968. The proposed increases range generally from 3 to 10 percent and for the most part they are 6 percent or less. As in prior proceedings, a special refund provision is included which will have application in situations where no increase or something less than the full increase proposed is authorized in this proceeding.

Proceedings through June 19, 1968.—Pursuant to the special rules of procedure set forth in our order of March 12, 1968, verified statements (affidavits) were submitted by the railroads in support of the proposed increases, and by protestants in opposition thereto; and opposition was also registered by protests filed in accordance with our General Rules of Practice. At that stage the principal question was whether the increase tariff schedules should be suspended, in whole or in part, pending an investigation into their lawfulness. Briefs directed to this issue were filed by the parties; and on June 13-14, 1968, we heard oral argument.

[1] Most of the increases being considered herein are set forth in the master tariff X-259, as amended; however, some of the provisions, such as restrictions on the application of the master tariff, are contained in agency or individual carriers' rate tariffs.

Since the petitioners intend to make like increases in their rates and charges on intrastate traffic, we notified the several States of the pendency of the proceeding; and, pursuant to section 13(3) of the act, representatives of four State commissions, the Honorable Ralph H. Wickberg of Idaho, the Honorable Charles J. Fain of Missouri, the Honorable Vernon B. Derrickson of Delaware, and the Honorable Edward L. Mason of Florida, sat with us throughout the oral argument. We have had the benefit of their counsel, both at that time and in connection with the conclusions reached herein.

Upon careful consideration of the matters presented by the parties, we concluded to suspend the proposed increases to the extent that they exceeded 3 percent. By order entered June 19, 1968, the proposed increases were suspended until January 24, 1969; but the respondents were permitted, on not less than 1 day's notice, to increase their rates not to exceed 3 percent (except for the disposition of fractions) subject to maximums no higher than those suspended and in no event to produce a greater revenue than that proposed in the X-259 tariff. The order also instituted an investigation of the proposed and the permissive increases. The respondents then filed a master increase tariff, "X-259-A," establishing the increases authorized in the order of June 19, 1968, which tariff became effective June 24, 1968.

Investigation proceedings.—The investigation was conducted under the special rules of procedure set forth in our order entered July 3, 1968. For the purpose of receiving evidence and argument with respect thereto we assigned the following sub-numbers to the tariff schedules and issues involved herein:

Sub-No. 2, railroad cost and revenue need;

Sub-No. 3, coal, tariff items 1065, 1070, 1075, 1080, 1085; 1090, 1095, 1100;

Sub-No. 4, iron and steel scrap, pig iron, iron ore, tariff items 845, 1060;

Sub-No. 5, grain, sugar beets and cane, sugar, molasses, flour, coffee, bakery products, tariff items 515, 520, 525, 560, 570, 580, 675, 680;

Sub-No. 6, accessorial charges, line haul, minimum charges, absorption, transit, tariff items 100, 110, 115, 130, 150, 155, 160, 165, 170, 180;

Sub-No. 7, woodpulp, pulpwood, textile and paper waste, paper, lumber, cotton, textiles, apparel, synthetic fibers, wool, tariff items 500, 505, 510, 690, 695, 700, 705, 710, 715, 720, 725, 900, 925, 970;

Sub-No. 8, farm products, fruits, nuts, meat, canned goods, dairy products, poultry and eggs, starch tapioca, tallow, liquor, tobacco, hides, tariff items 530, 535, 540, 545, 550, 555, 565, 575, 585, 590, 595, 600, 685, 910, 915, 920, 935, 940;

Sub-No. 9, fertilizer, aggregates, limestone, sand, asphalt, potash, shells, cement, brick, clay, lime, chemicals, gases, petroleum products, acids, pulp

mill byproducts, paint, drugs, soap, latex, tires, tariff items 605, 610, 625, 630, 635, 640, 645, 655, 660, 730, 740, 745, 750, 755, 760, 765, 770, 775, 780, 785, 790, 795, 800, 805, 810, 815, 820, 825, 830, 835, 950, 975, 980, 985, 990, 1020 (shells);

Sub-No. 10, miscellaneous ores, metal products, batteries, nonferrous scrap, salt, radioactive materials, sulphur, phosphates, tariff items 615, 620, 650, 665, 670, 735, 840, 865, 1000; and

Sub-No. 11, metal castings, iron and steel products, pipe, machinery, household appliances, vehicles, instruments and parts, furniture, fixtures, tiles, miscellaneous manufactured items, guns, ammunition, glass, abrasives, marine products, et cetera, tariff items 850, 855, 860, 870, 875, 880, 885, 890, 895, 905, 930, 945, 955, 960, 965, 995, 1005, 1010, 1015, 1020 (except shells), 1025, 1030, 1035, 1040, 1045, 1050, 1055.

Four hearing examiners were assigned to conduct hearings, which were held in Washington, D. C., starting September 9, 1968, and concluding October 8, 1968. The hearings were devoted mainly to cross-examination of respondents' witnesses and the introduction of some rebuttal evidence. Briefs directed to respondents' cost and revenue need and to the lawfulness of the tariff schedules under investigation were filed on or before November 12, 1968. As stated in our order of July 3, 1968, and as contemplated in section 15(7) of the act, this proceeding will not be the subject of an examiner's report and recommended order because due and timely execution of our functions requires an expedited decision. In this interim report we shall deal primarily, but not exclusively, with respondents' cost and revenue needs, which were the subject of the Sub-No. 2 hearing.

Petition to vacate suspension.—The Sub-No. 2 hearing started September 9, 1968, and concluded September 25, 1968. On the following day, by appropriate petition, respondents requested that we vacate our order of June 19, 1968, insofar as it suspended the proposed increase schedules, and that we permit those increases to become effective without further delay, but subject to the aforementioned refund provision. Numerous protestants, in replies to that petition filed on or before October 16, 1968, urged that it be denied. Several of them, referring to the general brief date of November 12, 1968, asked that action on the petition be deferred, in any event, until we have had opportunity to study the briefs and the record in the complete proceeding; and this we have done. Our conclusion herein, that respondents are in need of immediate relief, is based upon the entire record, including the evidence and briefs of the parties as well as the described petition and the replies thereto.

Preliminary rulings.— One of the above-mentioned replies, filed by the Coal Exporters Association of the United States, Inc., also contained a prayer for affirmative relief, in the form of a motion to cancel the interim X-259-A increase of 3 percent on coal destined for export as authorized by our order of June 19, 1968, and seeking also an order for refund of charges arising pursuant to that increase. Rule 101(e) of the Commission's General Rules of Practice (49 CFR 1100.101(e)) provides that a petition seeking any change in an order of the Commission must be filed within 30 days after the date of service of the order except for good cause shown and upon leave granted. The motion referred to, which was refiled October 21, 1968, does not comply with the rule and may not be considered.

Several protestants renew on brief their objections to certain rulings of the examiner, near the close of the Sub-No. 2 hearing, in regard to a pamphlet published by Hayden, Stone, Incorporated, members of the New York Stock Exchange, entitled "Railroad Industry Review 1968," dated August 27, 1968. Although not disclosed of record, the review was apparently prepared for Hayden, Stone by or under the direction of two financial analysts, Pierre R. Bretey and Karl Ziebarth. The examiner refused to have the pamphlet marked for identification or to receive it in evidence as a rebuttal exhibit of counsel. The examiner further refused to issue a subpoena to compel Mr. Bretey to appear and testify. Over the objection of respondents, the examiner allowed protestants to make an offer of proof as to the testimony they expected to adduce through Mr. Bretey. Referring to the pamphlet, protestants' counsel stated:

> This represents the information which is going out to the purchasers of railroad stock. I think this exhibit—or this document is entitled to be admitted simply as showing the attitude of the financial community toward railroad stocks. It has a bearing on whether railroad stocks are or are not accepted by the financial community.

Nowhere is it asserted that Mr. Bretey and his co-author are themselves investors, as distinguished from analysts and advisors to investors. Nor do we have any assurance that Mr. Bretey was the author of the portions of the pamphlet sought to be introduced. Arguing for the admissibility of such "rebuttal evidence," counsel for protestants referred to an explanatory letter sent by the Chairman on August 15, 1968, to all parties of record, and specifically to the following sentence:

Nor do the proceedings prohibit the presentation of rebuttal evidence by any party under circumstances where in the judgment of the presiding examiner such evidence is appropriate and in rebuttal of new matter.

We have examined the transcript of the proceedings in this connection and find no error in the rulings of the examiner. We concur in his judgment that the proffered evidence was not "appropriate and in rebuttal of new matter." We note that some of the protestants' briefs and replies to respondents' petition to vacate the suspension contain extended quotations from and numerous references to the pamphlet in question as if the factual assertions therein were competently established of record. These quotations and references are not entitled to consideration and they are stricken.

Increased operating costs.—In our reports in Ex Parte No. 256, *supra*, we reviewed the wage settlements and other cost increases experienced by the railroads since the previous general freight rate increase authorized in Ex Parte No. 223, *Increased Freight Rates*, 1960, 311 I.C.C. 373. As explained in our final report in Ex Parte No. 256, the cost totals alone are not meaningful except in relation to the volume of transportation performed. Accordingly, respondents in this proceeding have computed their unit operating costs by years, starting with 1961; and these are shown, together with comparable revenue data in appendix A hereto. We have checked these data and find them substantially accurate. Gross ton-miles reflect the total number of units of transportation produced and are therefore the most appropriate comprehensive measure of output for this purpose. Total operating expenses (including rents and taxes other than Federal income taxes) per 1,000 gross ton-miles actually decreased from $5.95 in 1961 to $5.58 in 1966, and then turned upward to $5.85 in 1967, an estimated $5.96 in 1968, and $6.05 for the constructive year. The unit-cost level for the constructive year is 8.42 percent above that for 1966. Respondents' constructive year projections are based on their estimated 1968 level of traffic demand (744,203 million revenue ton-miles and 12,792 million revenue passenger-miles) and second-half 1968 wage rates, material prices, and other cost factors in effect for a full 12 months.

Current wage increases, above those submitted by respondents in Ex Parte No. 256, but effective in 1967, include an additional 1 percent for engineers, conductors, shopcrafts, and train dispatchers; an additional 6 percent for engineers working without

firemen; increased car scales for road conductors; and 10 cents per hour for journeymen and mechanics. Further wage increases became effective in 1968, as follows: January 1, 4.3 percent for train dispatchers and 2.5 percent for other nonoperating employees, trainmen, and firemen; April 1, and October 1, 5 cents per hour each for journeymen and mechanics; July 1, 3.5 percent for trainmen, firemen, and all nonoperating employees except shopcrafts, 5 percent for engineers, conductors, and shopcrafts, and 5 cents per hour for a special fund for clerks. These wage adjustments with increases in fringe benefits and payroll taxes are estimated by respondents, on an annualized basis, to aggregate $437.1 million. However, as shown in respondents' exhibits and explained by their principal witness, this total is not intended to represent the extent to which actual labor costs are expected to increase from 1 year to another. For such comparisons we are referred to respondents' condensed income accounts, in which the labor expenses are directly related to the employment level of each year and thus reflect the extent to which rising wage rates are offset by improved productivity.[2]

Respondents' income account tabulations for 1966, 1967, 1968 (partially estimated), and the constructive year (including the proposed increases) are reproduced in appendix B hereto. We have carefully checked these data and find them substantially accurate in all material respects.[3] The estimates for 1968 and for the constructive year are expanded from returns to questionnaires submitted by accounting, traffic, and other officers of 25 "test carriers" representing approximately 84 percent of all class I railroads in the United States, based on operating revenues. These test carriers constitute, for this purpose, a representative group for the industry as a whole.

This evidence compels the conclusion that the entire adjustment proposed by respondents, if approved and made effective, would fall far short of meeting respondents' revenue need due to increased operating costs. For this purpose, 1966 is adopted as a base year and compared with the constructive year, which embraces all known changes of record. Use of 1966 as a base year is reasonable, and fair to shippers, because it reflects recent experience not complicated by a major rate revision, and the traffic volume is close to the current level. As shown in table 1, below, respondents' operating expenses, rents, and taxes

[2] Compare Ex Parte No. 256, 332 I.C.C. 280, 283-288.

[3] Some relatively minor exceptions are discussed latter in this report.

(excluding Federal income taxes) in 1966 totaled $9,422.6 million. Adjusted by territories, as shown in appendix C hereto, for the small differences in the traffic level of the constructive year, these base-year operating costs become $9,331.5 million. For the constructive year, the corresponding figure is $10,132.6 million, reflecting an increase in operating costs of $801.1 million. To this must be added $54.3 million, which represents the increase in respondents' fixed charges and contingent interest. Thus, their need for additional freight revenue, to be derived from both Ex Parte No. 256 and Ex Parte No. 259, to cover their increased expenses, is approximately $855.4 million.

TABLE 1

Operating expenses, rents, taxes and fixed charges
(excluding Federal income taxes)

	1966	Constructive year	Increase	
		millions		
Operating expenses	$8,117.7	$ 8,594.0	-------	-----
Equipment and joint facility rents	522.8	649.2	-------	-----
Taxes	968.4	1,025.9	-------	-----
	9,608.9	10,269.1	-------	-----
Less Federal income taxes	186.3	186.5	-------	-----
Total operating expenses	9,422.6	----------	-------	-----
Adjusted for constructive year volume	9,331.5	10,132.6	$801.1	8.58%
Fixed charges and interest	463.5	517.8	54.3	-----
Total, expenses and charges	9,795.0	10,650.4	855.4	8.73%

It will be noted that the increase of 8.58 percent shown in table 1 is consistent with and confirms the increase in the unit-cost level previously referred to. With the inclusion of fixed charges, which have risen more rapidly than the other expense items, the increase above the 1966 cost level is 8.73 percent.

The Ex Parte No. 256 rate increases, at the constructive year traffic level, should be generating approximately $300 million in increased freight revenue, which leaves $555.4 million in increased expenses to be met by the Ex Parte No. 259 increases in rates and charges. Respondents estimate that the 3-percent interim increase authorized by our order of June 19, 1968, will produce $265 million in annual revenue and that, if all of their proposed increases become effective, they will produce some $200 million in additional revenue, or an aggregate of $466.2 million. Protestants' attack on this estimate is not that it is understated but that, because the rate increases tend to cause diversion of traffic, the total revenue generated will be somewhat less. Approval of the entire rate adjustment would thus leave respondents short by at least $89.2 million of annual revenue needed simply to cover their increased expenses.

In the foregoing discussion we have given no consideration to the claim that respondents' revenues from passenger, mail, express, and "all other" services will have declined since 1966 by about $300 million, nor to the time lag usually experienced in establishing like increases on intrastate freight traffic.[4]

Conclusion as to immediate revenue need.— We conclude that respondents are in immediate need of additional freight revenue to offset, in part, their increased operating expenses, including fixed charges and contingent interest, and that our order of June 19, 1968, insofar as it suspended the operation of the proposal increase schedules, except in the limited respects hereinafter discussed, should be vacated.

Rate of return.— Since, as already indicated, our present decision rests upon other grounds, we shall not dwell at length upon respondents' rate of return and net investment. However, in view of the attention devoted to these subjects in the briefs, we deem it appropriate to clarify the situation in certain respects.

In keeping with their practice in prior general revenue proceedings, respondents submitted an orthodox cost-of-capital study through a qualified expert witness, who concluded that, on respondents' net investment as determined by the Commission, a reasonable rate of return would be 9 or 9 1/2 percent. It being apparent

[4] Cf. *Increased Freight Rates, Hawaii, Territories*, 1956, 299 I.C.C. 429, 436.

that respondents could not possibly achieve such a rate of return at the level of rates here proposed, the presiding examiner inquired whether the recommended rate of return was not, for all practical purposes in this proceeding, an academic concept. The answer, quoted in part in one of the briefs, was as follows:

> Well, I would say it is with reference to your need for computing the total revenues that you think the railroads ought to have. In that sense it is. But it is not an academic concept for the purpose of comparing what the railroads are actually earning compared to what would be fair in making your determination whether any given set of rates is fair and reasonable.

The first part of the witness' answer comports with our observation in Ex Parte No. 206, *Increased Freight Rates, E., W., and S. Territories, 1956*, 300 I.C.C. 633, 662, " * * * that there is no statutory requirement or statement of policy requiring the making of rates to yield a certain rate of return on investment either in the United States as a whole, or in the various rate territories." In other words, as argued on brief by several protestants, rate of return is not a statutory standard. We agree.

The second part of the witness' answer relates to the zone of reasonableness. In the event that the revenue at a given rate level were to yield a rate of return in excess of 9 1/2 percent, such a rate level, presumably, would not be just and reasonable to the public. The converse, however, is not necessarily true; a rate of return of 9 percent or less does not automatically place the rate level in the zone of reasonableness; but a rate of return in the range of 4 percent or less, which we have repeatedly characterized as substandard, is at least an indication that the underlying rate level is within the zone of reasonableness.

As calculated by respondents on the same basis as in previous cases, their rates of return, by districts and for the United States, in recent years and for the constructive year (with the proposed increases), are as shown in table 2, below; and they are clearly inadequate.

TABLE 2

Rates of return on net investment

	1966	1967	1968*	Constructive year*
		(percent)		
Eastern District	3.55	1.58	1.77	2.37
Southern District	4.45	3.56	3.65	4.36
Western District	4.03	2.75	2.93	3.35
United States	3.90	2.45	2.59	3.12

*Estimated

Some criticism is leveled at the above rates of return because some railroads have included, in their charges against net railway operating income, Federal income taxes on income from nonrailroad sources. In Ex Parte No. 206, *supra*, at 656, we said in regard to a similar contention:

> We agree with protestants that this sum should not be included in computing net railway operating income for purposes of determining a rate of return. However, the percentage relation which this amount bears to the total value of property used in common carrier service is so small that it would have only a very slight effect upon the rate of return.

Examination of the income accounts for those railroads which in 1967 had the largest amounts of nonoperating income discloses that the indicated correction of their reports would result in raising the rates of return in table 2 by not more than 0.01 percent. The criticism is valid but not of significant importance in this proceeding.

Net investment.—Some of the protestants contend that respondents' net investment is overstated, and that if it were reduced, obviously; the calculated rates of return would be more favorable.

We agree, as a matter of principle, with protestants' contention that the balances in account 80, Other Elements of Investment, and account 90, Construction Work in Progress, should be excluded from respondents' net investment for purposes of calculating their rate of return. Prior to 1963, bases for determining the rates of return for railroads were prepared from valuation records maintained by the Commission. These records reflected the original cost of carrier property as found for valuation purposes, appropriately corrected for additions and retirements as reported by the carriers in their annual reports of property changes. During the years that the Commission maintained these records, the cost of construction work in progress was not included as carrier operating property, such cost being allowable only after such property was actually dedicated to public service. See *Illinois Central R. Co.*, 46 Val. Rep. 1, 39-40. By order entered April 17, 1963, we required the railroads to record in their property accounts the original cost balances contained in the Commission's valuation records. The resulting differences, debit or credit, were recorded in account 80, a new account established for that purpose. At the same time there was established a new account (90) for construction work in progress. Accordingly, the two accounts represent (1) unsupportable items not includible in cost of property,

and (2) costs applicable to items of property not in transportation service at date of financial statement. In the circumstances, carriers are not entitled to a return on such amounts; consequently, the balances in these two accounts should be excluded. The effect of these corrections would be to raise the rates of return shown in table 2 by not more than 0.05 percent.

Various additional contentions of protestants regarding respondents' net investments have been examined and found to be without substance. Some of those most vigorously urged are restated below with our comments.

(1) *Contention.*—That land values and improvements in place in 1916 were inventoried at the 1910-1914 reproduction cost which was used as a beginning point for the current investment in railroad property, thereby overstating the net investment by the increased values of land and properties accruing between 1840 and 1914.

Comment.— In determining the valuation of railroads, it was found that the average prices that prevailed between 1910 and 1914 for other than land, represented, by and large, the average reproduction cost of railroads; and, in the absence of actual cost which was undeterminable, this index was applied as a beginning base for what later became known as "original cost" of railroad property, other than land. This base was perpetuated through separate reporting requirements until 1963, when, as above explained, we required the railroads to adopt the original cost balances as carried by the Commission in their investment accounts, with the differences, if any, being recorded in the new account 80. Additionally, over the years approximately 70 percent of the "original cost dollars" that was established to represent the cost of the railroad property at the date of basic valuations has been written off as a result of retirements of such property. Consequently, this large percentage of estimated original cost has been replaced by the *actual* cost of property which has been added subsequent to the date of basic valuations. The appraised value of land was never placed on the railroads' books but was used as part of the rate base in Commission proceedings prior to the year 1964. Upon adjustment of the railroad accounts as aforementioned, the railroads were required to place in their land account the actual cost of land, estimated in part. Such actual cost is used as part of the net investment in the instant proceeding.

(2) *Contention.*—That, for many years after the Commission's valuation of properties, many railroads capitalized maintenance expenses, thus further inflating the investment base.

Comment.— There is no responsible basis for such an allegation. Our prescribed accounting rules specifically prohibit the capitalization of expenses. Furthermore, subsequent to the valuation of railroad properties the Commission maintained a large force of valuation field auditors that closely scrutinized railroad property records for proper recording of all additions and betterments; and this procedure is still followed in connection with our current examinations of railroad accounts and records.

(3) *Contention.*—That until 1943 the railroads were not required to record depreciation for road property, thereby contributing to the inflation of the present net investment.

Comment.— While it is true that railroads were not required to record depreciation for road property until 1943 there are offsetting factors that should be considered in evaluating the adequacy of the accrued depreciation for road property; and, on balance, we do not believe that the present net investments are overstated for the reason indicated. There is, of course, no question whatsoever as to the adequacy of the depreciation reserves for equipment accounts.[5] In this connection, among other things, consideration has been given to the following:

(a) Many railroads have gone through reorganization. In each instance, when approving the opening entries for the reorganized railroad, we have required the railroad to establish a depreciation reserve considered adequate at the time for past accrued depreciation on road property.

(b) When railroads' accounts were adjusted in 1963 to record the "original cost" of property in their primary accounts, in instances when the adjustment created a credit balance in account 80, we permitted the railroads, upon application, to transfer an appropriate portion of such credit balance to depreciation reserve accounts for road property to the extent necessary to offset any underaccruals as at that time.

(c) Depreciation accounting is not prescribed for the "track structure" which includes crossties, rails, track material, ballast, and labor. The use of "betterment" accounting for rail results in the investment account balance showing a far lesser amount

[5] Cf. *Increased Freight Rates, E., W., and S. Territories, 1956, supra*, at 656-657.

(probably as much as 50 percent) than the actual cost of the rail that is in the track structure today. Crossties, in the carriers' accounts, have remained static in the amount that was recorded per tie at time of the initial valuation. This cost per tie ranges between 30 and 50 cents. If the tie account were restated today to reflect the actual cost of the ties that are in the track structure, the investment accounts would be increased over $1 billion.

(4) *Contention.*– That, in the case of a railroad reorganization, the net investment of the predecessor company has been continued on the books of the reorganized company; and further, that where one railroad acquires another for less than its book value the net investment of the railroad acquired is entered on the books of its new owner the same as on the books of the old company.

Comment.– These statements are basically true with respect to transactions occurring in past years. It should be clarified, however, with respect to reorganized companies, that we have required the reorganized company to adopt in its primary property accounts the "original cost" as determined by the Commission at time of the carrier's basic valuation, brought forward to the date of the transaction, in lieu of using the actual account balances reflected on the predecessor company's ledger. In many instances this adjustment of the accounts has actually resulted in a writedown of property account balances. The use of this procedure perpetuates for investment account purposes the cost of property at the time it was first dedicated to public service.

Statutory standards.– The present inquiry into respondents' cost and revenue need must be conducted in the light of the standards set forth in the Interstate Commerce Act. The rule of ratemaking, section 15a(2), provides:

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

In testing, first, whether the proposed rates will move the traffic, we reserve for further consideration in Sub-Nos. 3-11 such questions as discrimination, preference, and prejudice. The question at hand relates to the general freight rate level—are the proposed rates so unreasonably high as to be self-defeating? We

think not. As shown in appendix D hereto, the carload freight rate level has declined from the peak reached in 1958, while consumer and wholesale prices have steadily trended upward. Since the Ex Parte No. 223 increase the carload freight rate index (1950=100) declined from 114 in 1961 to 104 in 1966. Referring again to appendix A, respondents' average operating revenue per 1,000 gross ton-miles declined from $6.50 in 1961 to $6.30 in 1967. If all of the proposed increases are made effective, the latter average, for the constructive year will become $6.65. We agree with the judgment of respondents' traffic officers that the contemplated rate level would have no material adverse affect on the movement of traffic. We have previously found that respondents are in need of the additional freight revenue here sought to offset, in part, their increased operating expenses, including fixed charges and contingent interest. We conclude that the proposed rate level, generally speaking, is within the zone of reasonableness, where management is accorded substantial freedom in service pricing. This conclusion, we emphasize, is not a prejudgment of the issues in Sub-Nos. 3-11.

Exceptions.—Our conclusions as to the issues in Sub-Nos. 3-11 will be the subject of a separate and final report, which will embrace all of the tariff schedules under investigation, and will result in automatic refunds to shippers to the extent the proposed rates and charges are found unlawful. Our order herein, by permitting most of the proposed rates and charges to become effective at this time, will provide substantial immediate relief to respondents. We are, however, excepting from the scope of our order, and are retaining under suspension pending further consideration in Sub-Nos. 4 and 5, master tariff item 845, pig iron and iron and steel scrap and item 515, grain and grain products. The authority contained in our order of June 19, 1968, to increase respondents' rates 3 percent (subject to stated maximums) will be continued in force in regard to these two items.

FINDINGS

We find:

1. There is a critical need on the part of the respondent railroads for additional revenue to offset, in part, the increased operating costs not heretofore considered by us in approving their freight rates and charges. The public interest and that of the national defense, in a sound, adequate, and efficient transportation

system will be adversely affected unless the proposed increased interstate freight rates and charges, with the exceptions noted in our order, are permitted to become effective at this time.

2. Without the additional revenue to be derived from the increased freight rates and charges authorized herein, the earnings of respondents would be insufficient to enable them, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service consistent with the public interest and the national transportation policy.

3. The increased freight rates and charges herein authorized will not exceed a maximum just and reasonable level of rates and charges. This finding, however, is without prejudice to other or different findings to be reached in Sub-Nos. 3-11 in regard to particular rates and charges.

4. All of the tariff schedules under investigation, including those herein permitted to become effective, are subject to an automatic refund provision; and, with the other remedial provisions of the act, the shipping public in general is reasonably protected. On the other hand, withholding of the authority herein authorized would result in irreparable injury to respondents and would be contrary to the public interest.

5. Our findings as to justness and reasonableness, which are based upon all of the evidence before us, including typical evidence as to rates and charges in and between all territories, will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act.

An appropriate order will be entered, including such modification of our outstanding orders and granting such forth-section relief as may be necessary to permit the suspended schedules to become effective, to the extent indicated herein, on 1 day's notice, pending further order of the Commission.

APPENDIX A

UNIT COSTS AND UNIT REVENUES

Railroads of class I in the United States

Year	Gross ton-miles excluding locomotives (billions)	Total operating expenses[a] (millions)	Total operating revenues (millions)	Average per 1,000 gross ton-miles	
				Expenses[a]	Revenues
	1	2	3	4	5
1961	1,413.0	$8,408.9	$9,189.1	$5.95	$6.50
1962	1,459.9	8,557.4	9,439.9	5.86	6.47
1963	1,499.7	8,589.8	9,559.5	5.73	6.37
1964	1,557.6	8,900.4	9,856.5	5.71	6.33
1965	1,608.7	9,082.7	10,207.8	5.65	6.35
1966	1,688.6	9,422.5	10,654.7	5.58	6.31
1967	1,645.3	9,622.2	10,366.0	5.85	6.30
1968[e]	1,675.5	9,987.5	10,799.8	5.96	6.45
C. Y.	1,675.1	10,132.6	11,136.5	6.05	6.65

a—Includes operating rents and taxes other than Federal income taxes.
e—Estimated.
C. Y.—Constructive year with proposed rate increases.

APPENDIX B

TRAFFIC, EMPLOYMENT AND CONDENSED INCOME ACCOUNT

Railroads of class I in the United States

Line No.	Item	1966	1967	1968	Constructive year
	1	2	3	4	5
			millions		
1	Revenue ton-miles	$738,395	$719,755	$744,470	$744,203
2	Revenue passenger-miles	17,085	15,201	12,792	12,792
3	Gross ton-miles, freight and passenger service, excluding locomotives	1,688,642	1,645,274	1,675,453	1,675,135
4	Average number of employees	630,895[1]	610,192[1]	589,591[1]	592,322[1]
5	Net investment	26,820.4	27,628.8	27,817.3	27,817.3
6	Operating revenues—total	10,654.7	10,366.0	10,799.8	11,136.5
7	Freight	9,280.6	9,130.2	9,725.0	10,052.3
8	Passenger	543.6	485.4	416.6	417.5
9	Mail	304.0	263.6	195.0	195.2
10	Express	67.3	60.7	43.7	44.1
11	All other	459.1	426.1	419.5	427.4
12	Operating expenses—total	8,117.7	8,203.3	8,460.0	8,594.0
13	Wages charged to expenses	4,605.8	4,639.5	4,795.9	4,893.1
14	Depreciation and retirements	744.8	763.9	785.0	787.8
15	Other expenses	2,767.1	2,799.9	2,879.1	2,913.1
16	Taxes—total	968.4	910.5	973.4	1,025.9
17	Payroll	439.1	477.2	508.0	515.8
18	Federal income	186.3	66.5	94.4	136.5
19	Other	343.0	366.7	371.0	373.6
20	Equipment and joint facility rents net dr.	522.8	574.9	648.5	649.2

Railroads of class I in the United States—Continued

Line No.	Item	1966	1967	1968	Constructive year
	1	2	3	4	5
			millions		
21	Net railway operating income	$1,045.9	677.4	717.9	867.4
22	Rate of return (line 21÷5) (percent)	3.90	2.45	2.58	3.12
23	Other income	399.5	457.5	427.0	420.1
24	Miscellaneous deductions	78.1	84.3	85.0	83.6
25	Fixed charges and other deductions	463.5	495.9	517.7	517.8
26	Ordinary income	903.8	554.7	542.2	686.1

1—Whole numbers.

APPENDIX C

Operating expenses, rents, taxes, and fixed charges (excluding Federal income taxes)

	Eastern district		Southern district		Western district	
	1966	Constructive year	1966	Constructive year	1966	Constructive year
			millions			
Operating expenses	$3,240.3	$3,396.7	$1,205.7	$1,328.3	$3,671.6	$3,869.0
Equipment and joint facility rents	245.2	335.9	79.6	92.8	197.9	220.5
Taxes	340.9	384.1	144.3	161.3	483.2	483.5
	3,826.4	4,113.7	1,429.6	1,582.4	4,352.7	4,573.0

Operating expenses, rents, taxes, and fixed charges (excluding Federal income taxes)—Continued

	Eastern district		Southern district		Western district	
	1966	Constructive year	1966	Constructive year	1966	Constructive year
	millions					
Less Federal income tax	$41.6	$39.7	$27.6	$28.6	$117.1	$68.2
Total operating costs	3,784.8	4,074.0	1,402.0	1,553.8	4,235.6	4,504.8
Gross ton-miles	583,968	569,957	280,349	283,749	824,325	821,429
Ratio, constructive year/1966	1.000	0.976	1.000	1.012	1.000	0.996
1966 costs at constructive year volume	3,694.0		1,418.8		4,218.7	
Fixed charges, contingent interest	222.6	244.4	76.6	88.9	164.3	184.5
Total operating expenses and fixed charges	3,916.6	4,318.4	1,495.4	1,642.7	4,383.0	4,689.3
Increase over 1966		401.8		147.3		306.3
Percent increase		10.26		9.85		6.99

APPENDIX D

Comparison of BLS consumer price and wholesale price indexes with I.C.C. index of railroad construction costs and freight rate indexes

Year	Consumer price	Wholesale price	Annual railroad construction costs	Railroad carload freight rates
		1950=100		
1947	92.8	93.5	89.6	80
1948	100.0	101.8	98.3	93
1949	99.0	96.2	98.6	99
1950	100.0	100.0	100.0	100
1951	108.0	111.4	106.2	102
1952	110.4	108.3	109.4	109
1953	111.2	106.8	113.2	111
1954	111.7	107.0	115.9	109
1955	111.5	107.4	116.7	108
1956	113.0	110.8	125.7	112
1957	116.9	114.1	132.3	118
1958	120.2	115.7	135.4	121
1959	121.1	115.9	138.2	118
1960	123.0	116.0	138.5	116
1961	124.3	115.6	137.8	114
1962	125.8	115.9	137.5	112
1963	127.3	115.6	137.2	109
1964	129.0	115.8	137.2	107
1965	131.1	118.1	137.8	105
1966	134.9	122.0	140.3	104
1967	138.7	122.2	N.A.	1050

p—preliminary

APP C

Served January 27, 1969

30440

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 259

INCREASED FREIGHT RATES, 1968

EX PARTE NO. 259

INCREASED FREIGHT RATES, 1968

Decided January 9, 1969

Proposed increases in railroad freight rates and charges intraterritorially within eastern, western, and southern territories, and interterritorially between such territories found just and reasonable except as specifically provided herein. Appropriate order entered, including such modification of our outstanding orders and fourth and sixth section relief as may be necessary to permit the increases approved to be established and maintained.

Appearances as shown in prior report.

Additional appearances: *W. R. Humphrey, Jr., S. J. Jablonski,* and *Gerald E. Stitt* for protestants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Our prior report in this proceeding, decided November 25, 1968, (332 I.C.C. 590), concerned primarily the issue of the increased operating costs of the railroad respondents and the extent to which a need for increased revenues had been proved. We there found that the respondents had established the need for additional revenue at least as great as that sought by the proposed increases in their rates and charges, and partially vacated our order of June 19, 1968 which suspended operation of the schedules of proposed increases, but permitted an increase of 3 percent to become effective pending the outcome of this proceeding. The proceeding was continued for the consideration of the lawfulness of the proposed and interim increases as they applied to specific commodities and services, and of the evidence and arguments of all parties with respect thereto. The procedural history of the case is set forth in our prior report and will not be repeated. Our findings as to increased railroad operating costs and revenue need, as set forth and explained therein, are adopted and made part of this report as though fully restated. Those findings, together with the

further findings made in this report, constitute the basis for our ultimate conclusions and order herein.

The proposed increases vary from 3 to 10 percent, or by specific amounts generally within that range. Many protestants object to this approach contending that it is productive of discriminations. The higher increases on certain commodities or services, however, stem from recognition by the respondents of the extent to which rates on those commodities or services can be increased without producing substantial loss of traffic to competing forms of transportation or substantial reduction in the volume of traffic. Where lesser increases apply they reflect a determination by the respondents that any greater amount would not, at this time, result in increased revenues. While a single percentage increase has the appearance of uniformity and nondiscriminatory treatment of shippers, we have indicated in the past the need for a more selective approach. Even where uniform increases have been approved, competitive conditions have quickly required the carriers to make revisions with respect to specific commodities in order to retain traffic. The consequence has been, within a short time, an increased rate structure as varying as here proposed.

Inherent in a general rate increase proposal is the right of election by specific carriers to make use of the authority in whole, in part, or not at all. Thus, our conclusions herein do not require that any respondent increase its rates by any particular amount nor, except as specifically provided herein, do they preclude variability of application, provided increases do not exceed those allowed. We do not herein purport to determine whether the particular rates which result from the increases are maximum reasonable rates, nor does our order constitute a prescription of rates within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370.

The Manufacturing Chemists' Association asserts that the additional revenue to be derived from chemical traffic under the proposed increases is excessive and out of proportion to the volume of chemical traffic. Other protestants have called attention to similar conditions with respect to their traffic, and to the fact that in particular rate tariffs, various railroads have flagged out of the increases on various commodities in whole or in part. The contention is made that the respondents are assessing an unreasonable proportion of the increased revenue need upon some industries while failing to assess a reasonable proportion upon others. That different commodities or services make varying

contributions to net revenue is well recognized. *Sugarcane From South Florida to Clewiston, Fla.*, 281 I.C.C. 47, 63. Our authority under section 15(1) in respect to rates rests upon a finding that the proposed rate is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of the Interstate Commerce Act. The criteria provided by the statute, including those set forth in section 15a(2), do not comprehend consideration of the extent to which the overall movements of particular commodities contribute to net carrier revenue in a proceeding of this nature. We are concerned with the lawfulness of the increased rates and charges applicable to the various commodities and services; the effect of such increases on the movement of traffic; the need, in the public interest, for adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and the need for revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

One of the primary contentions made by protestants is that the increases will result either in drying up movement of particular commodities or diversion of the traffic to competing forms of transportation, to such an extent that there will be no actual revenue increase produced. They seek to have us apply the criteria set forth in section 15a(2) of the act and bar the increases on the ground that they would be self-defeating. The respondents assert that such consequences will not ensue. While we shall refer to certain of these arguments hereinafter in connection with specific commodities, we observe at the outset that predictions of this nature are always diametrically opposed in rate increase cases and must be treated as having limited probative value. For these reasons, denial of rate increases for which need has been established would require evidential support more reliable and persuasive than has been provided in this record.

A number of protestants submitted studies showing costs and revenues for the transportation of particular commodities or types of traffic. It is contended that revenues from present rates, without the increases, now exceed out-of-pocket costs, and, in many instances, fully-distributed costs, by substantial margins. Increases, it is argued, are not justified in such cases. A related contention is that the respondents have failed to show that the increases in operating costs directly related to the transportation of specific commodities are proportional to the rate increase proposed for such commodities. Neither of these contentions is

sufficient to warrant denial of the increases. It is clear that rates substantially in excess of full costs do not necessarily exceed a maximum reasonable level. *General Motors Corp.* v. *New York Central R. Co.*, 311 I.C.C. 622, 625. Additional revenue required to meet increased operating costs and fixed charges must be obtained from all traffic insofar as possible, whether or not specific traffic is profitable, or contributes more or less revenue, or incurs more or less costs than other traffic. Costs of specific commodity movements are not in issue. See *Increased Freight Rates, E., W., and S. Territories, 1956*, 300 I.C.C. 633, 676. Our admonition in *Increased Freight Rates, 1967*, 332 I.C.C. 280, 285, respecting a study of the unit costs of performing transportation services did not contemplate detailed, individual studies of particular traffic movements. The compilation, presentation, and evaluation of data in such massive proportions, as urged by protestants, would make impossible the effective prosecution of our regulatory function, and is not required by the Interstate Commerce Act. *United States* v. *Louisiana*, 290 U.S. 70, 76.

Commodity grouping.—On March 7, 1968, the respondents issued a publication entitled Standard Transportation Commodity Code Tariff No. 1 (STCC), effective April 16, 1968, which consisted of a listing of commodities arranged as follows. The code numbers were assigned in general groupings, each designated by a two-digit number from 01 to 42. Subgroupings of commodities within the general groups were assigned numbers containing additional digits up to a maximum of five, preceded by the general group numbers, the arrangement being such that any particular code number includes all commodities more specifically coded with that number that under a heading of fewer digits. Thus for example:

Code 23	Apparel; AAO. Other Finished Textile Products or Knit Apparel.
23 1	Mens, Youths or Boys Clothing;
	aao. uniforms
	exc. leather or sheep lined, or raincoats see 238
23 11	Mens, Youths or Boys Clothing;
	aao. uniforms
	exc. leather or sheep lined see 2386 or raincoats see 2385
23 111	Mens, Youths or Boys Clothing;
	aao. uniforms
	exc. leather or sheep lined see 23861 or raincoats see 23851
23 111 10	Blazers, wool
23 111 50	Lumberjacks, cotton or cotton and wool

23 3		Womens, Misses or Childrens Clothing; aao. infants exc. fur see 237, raincoats see 238 or surgical see 384
23 5		Caps, Hats or Millinery; aao. hat bodies exc. fur see 237

(hao—also applies on)
(exc—except)

Tariff X-259, here in issue, grouped the commodities to which the proposed rate increases applied under separate tariff item numbers but, by use of the Standard Transportation Commodity Code numbers referred to above, made the increases applicable to numerous commodities included within the code groupings. This was accomplished by listing the most general group number and commodity description in the increase tariff. Thus, for example, Item 660 of the tariff provides an increase on STCC 14 716 *Sulphur, crude, liquid, molten or solid.* Reference to STCC Tariff No. 1 shows that Code 14 716 includes as subgroups the following items:

14 716 10 Sulphur (brimstone), ot crude
14 716 15 Sulphur (brimstone), crude
aao. sulphur rock or sulphur balls
14 716 20 Sulphur, liquid or molten
14 716 30 Sulphur residue

(ot—other than)

Some of the protestants have challenged this method of tariff publication as unnecessarily intricate and productive of confusion. We are satisfied, however, that it is a worthwhile step toward the eventual simplification of tariffs and may, with appropriate development and refinement, lead to application of automatic data processing procedures in determining rates. It is also contended that, in certain instances, the grouping of commodities in tariff X-259 by use of the STCC code numbers disrupted relationships in rates between commodities which, for competitive or other reasons, have historically been accorded similar rates and rate

adjustments. In some instances, the respondents have acknowledged that revisions of the tariff are appropriate to retain such relationships. These are considered in this report as they arise in connection with our discussion of the involved commodities. The respondents will be expected to give careful consideration to other such instances when discovered or brought to their attention and to make such revisions as are warranted.

A number of protestants have called attention to the fact that tariff X-259, in referring to the Standard Transportation Commodity Code, identifies it only by reference to the publication of the Traffic Executive Association—Eastern Railroads, Agent, I.C.C. C-686. It is argued that, since this publishing agent acts only for eastern railroads, all other railroads (except in joint-line haul situations) are without authority to employ the master increase tariff X-259 by reference to the commodity groupings in the code. We consider this contention lacking in merit. Reference in the master tariff to the publication of the code by one of the agents is sufficient.

Commodities generally.—Respondents propose to increase their class rates by 5 percent. On commodity and exceptions rates, in those instances where specific carload rate increases are not published, the proposed increase is 6 percent. Only new, sporadic, or light and bulky traffic moves at carload class rates and only a few class I railroads offer unrestricted less-than-carload service. The respondents also propose to increase their per-car minimum charges for line-haul service 5 percent between and within southern and western territories, excluding some destinations on The Chesapeake and Ohio Railway Company. There is no substantial evidence in opposition to these increases. The class I railroads in 1966 incurred a deficit of more than $100 million in handling less-than-carload traffic. We are of the opinion that the proposed increases of the foregoing rates and charges will be just and reasonable.

Accessorial services.—Respondents propose to increase accessorial service charges 6 percent with various exceptions. For example, charges for split delivery, loading, or unloading are increased 5 cents per 100 pounds or $1 a ton, except that in eastern territory the charges would be increased 6 percent, and a $3 minimum increase is provided in some instances. Certain of the protestants who must use the railroads' services pay substantial sums for accessorial services and they claim that the increases in such charges are excessive or discriminatory.

The charges for accessorial services were increased between 1960 and 1967; thus the respondents did not forego such increases as they did in connection with their line-haul rates. Nevertheless, respondents' evidence shows that their territorial average out-of-pocket costs of providing accessorial services generally exceed the charges made for these services. Since this proceeding is to determine the lawfulness of the proposed increases, rather than inequities in particular charges, individual cost studies at the numerous locations were not required.

Different accessorial charges are provided for like services on different commodities or at different localities. Thus, higher transit charges are applied on lard or shortening than on canned goods; and transit charges at Chicago, Ill., are maintained per 100 pounds, which results in greater charges for large shipments than charges stated per unit other than weight. Some protestants argue that the lower charges should be increased to cover more of respondents' costs, and that the higher charges should not be increased or should be increased by lesser amounts. Numerous protestants, on the other hand, object to the higher percentage increases in the lower charges which result from use of the $3 minimum. We conclude that the increases in the accessorial service charges are within the zone of reasonableness and that merely showing that they are on relatively different levels does not establish that they are unlawful.

Trailer-on-flatcar (TOFC).—The respondents propose a 6-percent increase in rates and charges for TOFC service, except for ramp-to-ramp service and where specific increases are provided for carload commodity and exceptions rates. The charges for ramp-to-ramp TOFC service would be increased 6 percent between and within eastern and western territories, but 3 percent from, to, and within southern territory. The Virginia State Ports Authority, The North Atlantic Ports Association, Inc., and the Port of New York Authority oppose the increase for ramp-to-ramp service, asserting that it would disturb port rate relationships and cause a substantial diversion of import and export traffic to South Atlantic and Gulf ports; but they have not referred to specific port relationships prescribed by us which will be disturbed by the proposed increases. In the event a prescribed basis is disturbed, the respondents will be expected promptly to restore the relationship.

ITOFCA, Inc., a nonprofit association of shippers, opposes the 6-percent increase in detention charges on trailers provided by

the railroads for TOFC ramp-to-ramp service. It argues (1) that the present charges are excessive when related to the railroads' investment in trailers, the interest on the investment, and the cost of maintenance and (2) that the trailer detention charge is excessive when related to the demurrage charge on a like shipment in boxcars, for which no increase is proposed. In this type of TOFC service the shipper or receiver arranges for the drayage of the trailer between its plant and the railroad's ramp. The shipper or receiver, or his agent, the drayman, has possession of, and can use, the trailer, whereas a boxcar remains on the rail siding and has little use except for possible storage. Thus, trailer detention charges and boxcar demurrage charges cover unrelated services. The detention charge, moreover, may be avoided by promptly returning the trailer to the railroads. We see no reason why this service should not bear a portion of the railroads' increased operating costs and we find no unlawfulness in the proposed increase in the trailer detention charge.

Switching.—A 6-percent increase is proposed in charges paid by the shipper or receiver for intraplant, intraterminal, and interterminal switching. Evidence in opposition to the increases was offered by petroleum, steel, beer, grain, and other interests. Lukens Steel Company noted that its intraplant switching charge had been increased $5, which amounted to 35 percent, under Ex Parte No. 256. The charges at that level ranged between $19.49 and $23.39 per car. The 6-percent increase sought herein would make a total increase of 41 percent, above the pre-Ex Parte No. 256 level. The official territory out-of-pocket cost, increased to the January 1, 1968 level, for providing this service is shown as $30.88 in boxcars and $33.59 in other cars.

The members of Western Pennsylvania Refiners Traffic Association have plants in small communities usually on the line of a single carrier, and they require simple switching services. The association argues that the increases will apply to new minimum charges, which were suspended in Investigation and Suspension Docket No. 8404, Switching Charges, Eastern Territory. Although that proceeding was discontinued July 18, 1968, after the suspended increases were canceled, as pointed out by respondents in their brief, the new minimum charges were then published in their switching tariff and became effective September 13, 1968. The association argues that the proposed increases added to those in Ex Parte No. 256 are in excess of any just and reasonable charge for performing the service. Reference is made to present

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1083, 78

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,

Appellants,

and

STATE OF NEW YORK, DEPARTMENTS OF AGRICULTURE OF THE STATES OF MAINE, *et al.*,

Intervenor-Appellants,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees,

and

ABERDEEN AND ROCKFISH R.R., *et al.*,

Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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Jurisdictional Statement

Appellants, Atlantic City Electric Company, Niagara Mohawk Power Corporation, Public Service Electric and Gas Company, Rochester Gas and Electric Corporation (hereinafter Plaintiffs-Appellants, or Plaintiffs) and the State of New York, together with the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland and Massachusetts (hereinafter